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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-462

FORD MOTOR COMPANY,

Petitioner,

—v.—

MAURIZIO D. FORTUNATO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BENJAMIN H. SIFF,
233 Broadway,
New York, N. Y. 10007
212 349-3990
Counsel for Respondent

THOMAS R. NEWMAN
Of Counsel

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This is an ordinary personal injury action in which defendant's petition for certiorari is bottomed on frivolous complaints with respect to the summation of plaintiff's counsel, complaints which were considered and rejected by the Court below.

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The predicate for the petition ignores the time honored rule that the purpose of granting certiorari is

> "[t]o bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." (*Magnum Co.* v. *Coty*, 262 U.S. 159, 163)

There are no such questions in this case.

Statement

Nothing is said in the petition concerning the nature of plaintiff's proofs or the defense.

A reading of the record will demonstrate, however, that plaintiff's evidence established that the design of the automobile in question was such as in effect to make it a bomb on wheels.

This was undisputed and unchallenged.

It was this evidence that led the jury to its verdict, and not anything that plaintiff's counsel said or did.

The undisputed expert testimony as to Ford's dangerous design.

Plaintiff's expert, Professor Daniel J. O'Connell, testified with respect to plaintiff's Mustang (343a)*:

> "A. The design, the arrangement of the gasoline tank relative to the passenger compartment, it is extremely dangerous because it allows direct con-

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* References in parentheses are to pages of the Appendix in the United States Court of Appeals for the Second Circuit, a copy of which, together with the briefs, has been certified to this Court.

nection with a highly dangerous flammable fluid and this compartment and when we take into account the trough-like design of the floor of the passenger compartment to act as a trap, and to allow this flammable fluid to accumulate, (558) then the entire arrangement is extremely dangerous. There is no question about it."

Plaintiff's Mustang was not an isolated case.

Edward R. Gloyd, assistant Chief of the Safety Office of the United States Army Corps of Engineers (55a), had been assigned to make an investigation into the safety of Ford's drop-in gas tanks (57a).

Upon completion of his assignment, Gloyd concluded that the drop-in tank feature whereby the top of the tank serves as the floor of the trunk was an "extremely unsafe design" (59a, 79a). He explained the reason for his conclusion (79a):

> "A hole in the gas tank would permit fumes to accumulate in the trunk. These could enter the body of the car. Gasoline is, within certain limits, highly explosive or flammable. These fumes could accumulate."

According to Gloyd, the Mustang's construction was such that after the fumes accumulated in the trunk to some degree, they "are going to go into the passenger compartment" where they mix with the air and form an explosive mixture (91a).

The witness further testified that if such a mixture of accumulated fuel vapor found its way from the trunk into the passenger compartment and someone pulled the cigarette lighter out, that would be "a sufficient form of ignition to cause an explosion" (91a). Professor O'Connell testified to like effect (340a).

That is precisely what the jury was entitled to find had occurred in this case (27a-29a, 54a, 113a-116a, 166a, 341a).

The defense

Mr. Gilford Gorker was the only one of the vast corps of 12,000 to 15,000 engineers employed by Ford in "product development" who was called as a witness for the defense (592a). And he had had nothing to do with the design of the gas tank in issue (592a, 607a).

Although Professor O'Connell and Mr. Gloyd had categorically stated that the design of the tank was dangerous in that it created a fire hazard, Mr. Gorker said not one word in denial of the charge.

The main prop of the defense was the testimony of Paul E. Toth, employed by Ford not as an engineer but as a supervisor of industrial hygiene (614a). The thrust of his testimony was that he had been unsuccessful in attempting to bring about experimentally the conditions which plaintiff's proof established as the cause for the accident (615a-16a).

The record demonstrates that the conclusion Ford sought to draw from Toth's experiments was unwarranted and of no probative value. Toth made his tests a week before the trial pursuant to request by a member of Ford's legal department (618a) who told him "precisely what kind of test to make" (618-19a). Toth was aware that the results of his tests might be used by Ford in litigation against it, but he claims not to have been told any of the facts of this lawsuit (619a). No impartial observer was present at the time Toth made his tests, everything was conducted under the aegis of Ford employees only (620a). He made no written report of his findings (620a).

The test consisted of punching a hole in the gas tank of a 1967 Mustang and then driving it for approximately 10 miles around the streets of Dearborn, Michigan (615a-16a). This was done on September 29 which, of course, is not to be equated with the conditions prevailing in July (618a). Neither the speed at which the car was driven about nor the number of stops and whether they were short or gradual was stated; admittedly, a cigarette lighter was not used (621a). Accordingly, there was no proof of identity of conditions so as to give the tests any meaningful probative quality.

In *New York Central R.R. Co.* v. *Johnson,* 279 U.S. 310, 319, cited at pages 2 and 11 of petitioners' brief, this Court pointed out the necessity of presenting cases with fairness and candor lest the good name of the Bar be discredited and the administration of justice obstructed.

Bearing in mind petitioner's contention that Ford's "physical tests showed that plaintiff's theory of the accident could not be reproduced with an actual Mustang" (Petition, p. 15), and that the fumes "could not have reached an explosive level", we submit that it bespeaks a regrettable lack of candor for petitioner to have omitted the following highly significant testimony elicited during cross-examination of Ford's expert (621a-622a):

> "Q. . . . are you saying in effect that after ten minutes you measured the gas and by that time more than three-quarters of the amount that would be necessary to cause an explosion was already there? A. That's correct.
>
> Q. And where was it in the car? A. In the car, passenger compartment, driver's seat.
>
> Q. Did you make an estimate how much longer it would take for that other little bit to get in there and blow up if it was ignited? A. I did not.
>
> * * *

Q. Would you hazard a guess? A. Probably in a matter of five minutes.

* * *

Q. *By your figures, after 15 minutes you would have an explosion hazard?* A. *Yes.*

Q. Is that why you didn't use a cigarette lighter? A. I wasn't in the car at the time." (emphasis added).

There is no Reason to Grant the Writ

It borders on the frivolous to suggest that certiorari should be granted so that this Court may decide whether a new trial of this personal injury action is required because the jurors were told that the Ford Motor Company "is a large corporation with many employees". Any person having the minimum qualifications to sit as a juror knows that.

The Court of Appeals rejected petitioner's contention, stating:

> "An examination of the closing arguments of counsel in the light of the transcript and other parts of the record makes clear that this claim is without merit." (Petitioner's Appendix A, pp. 13a-14a).

There is nothing in this case that warrants further review by this Court.

With respect to the additional questions which petitioner states it wishes to present if certiorari is granted, we respectfully refer the Court to the comprehensive opinion by the Court of Appeals and our brief for appellee in the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N.Y.
September 28, 1972

Respectfully submitted,

BENJAMIN H. SIFF,
Counsel for Respondent
233 Broadway
New York, N. Y. 10007

THOMAS R. NEWMAN
of Counsel.